Pepsi America, Inc. (fka Delta Beverage Group) *and* Teamsters Local 1196, International Brotherhood of Teamsters, AFL–CIO. Cases 26–CA–19686, 26–CA–19738, and 26–CA–19988

August 13, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On October 1, 2001, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found, among other things, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its attendance policy. In February 2000, the Respondent, unilaterally and without notice to the Union, eliminated from its attendance policy a provision that enabled employees to earn credits for good attendance that could be used for future paid time off. At the time that the Respondent made this change, some of its employees had earned these credits and had not yet expended them. The Respondent's change eliminated the employees' existing credits as well as the employees' ability to earn future credits.

The Respondent contended that it could unilaterally change the attendance policy because it unilaterally changed rules concerning employee conduct, including attendance, in the past without union objection and because it was authorized to do so under the management functions article of the collective-bargaining agreement. In support of this contention, the Respondent cited language from that article giving it the right "to establish, maintain, and enforce rules and regulations and to change and abolish same" and to "determine job classifications, standards of performance, and to require satisfactory compliance therewith."

Concluding that the Respondent's unilateral change violated the Act, the judge found that the collective-bargaining agreement did not specifically provide the Respondent the right to unilaterally change its attendance policy and that the Respondent had failed to establish that the Union had waived its right to bargain over the attendance policy change.

We adopt the judge's finding that the Respondent's unilateral change of its attendance policy violated Section 8(a)(5) and (1), but only for the following reasons. The portions of the management functions article on which the Respondent relies concern rules governing employee conduct, as the Respondent itself asserts. The matter at issue here—the Respondent's attendance credit program—concerns an employee benefit, not a rule. The program does not regulate attendance; it establishes a reward for good attendance—that is, a benefit or an additional form of compensation. In sum, the management functions provision relied on by the Respondent does not even arguably apply to the attendance credit program. Similarly, the Respondent's contention that it has historically changed rules unilaterally, pursuant to the management functions article, is irrelevant to the issue whether it could unilaterally change the attendance credit program benefit. In these circumstances, where no contractual provision even arguably applies to the subject of the Respondent's unilateral change, it is unnecessary to apply either a "contract coverage" analysis, which the Respondent urges us to do, or a "clear and unmistakable" waiver analysis, as the judge did. On this basis, we adopt the judge's finding that the Respondent's unilateral change of its attendance policy violated Section 8(a)(5) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pepsi America, Inc. (fka Delta Beverage Group), Collierville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We amend the judge's remedy to provide that backpay shall be computed in the manner provided in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies when, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, 183 NLRB at 683.

We shall modify par. 2(f) of the judge's recommended Order in accordance with *Ferguson Electric, Inc.*, 335 NLRB 142 (2001). Additionally, we shall change the date in par. 2(g) of the judge's recommended Order from August 1, 1998, to February 8, 2000, the date of the first unfair labor practice, in accord with *Excel Container, Inc.*, 325 NLRB 17 (1997).

We will also substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

1. Substitute the following for paragraph 2(f).

"(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the following for paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its facility in Collierville, Tennessee, copies of the attached notice marked 'Appendix.'[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 8, 2000."

3. Add the following paragraph as 2(h):

"(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

MEMBER WALSH, concurring.

I agree with my colleagues in all respects except for their rationale for affirming the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) by unilaterally revising the attendance policy to eliminate a provision that enabled employees to earn credits for good attendance that could then be used to get paid time off.

I fully agree with the judge's rationale for finding this violation. It is solidly based on well-established Supreme Court and Board precedent governing resolution of the question of whether a union has contractually or by practice waived its statutory right to bargain about terms and conditions of employment. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 NLRB 180 (1989).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT institute unilateral changes in the attendance policy, grievance procedure, or make contract modification of the hours of the can line affecting the terms and conditions of our employees in the following appropriate unit:

Included: All truck drivers, warehousemen, production workers, dock workers, fleet, quality control and maintenance personnel employed at Respondent's facility at Collierville, Tennessee.

Excluded: All office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT bypass Teamsters Local 1196, International Brotherhood of Teamsters, AFL–CIO and deal directly with the unit employees concerning their terms and conditions of employment.

WE WILL NOT fail or refuse to notify the Union of any proposed changes in the terms and conditions of employment of the unit employees.

WE WILL NOT fail or refuse to furnish the Union with relevant information as the collective-bargaining representative of the employees.

WE WILL NOT threaten our employees for their engagement in concerted activities.

WE WILL NOT issue written warnings or other discipline to our employees because of their engagement in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL upon request by the Union immediately rescind any of the unilateral changes instituted by us in the

attendance policy, the grievance procedure, or other contract modifications of the hours of the can line employees.

WE WILL notify the Union and offer to bargain concerning any proposed changes in the hours and terms and conditions of employment of the unit employees.

WE WILL immediately furnish the Union with the information requested by it in February 2000, concerning the attendance policy and will furnish any other relevant information within a reasonable period.

WE WILL rescind the written warning issued to Howard Westbrook and will inform him in writing that it shall not be used against him in any manner in the future.

WE WILL make whole the unit employees for any loss of wages or benefits incurred by them as a result of the unilateral changes, with interest.

PEPSI AMERICA, INC. (FKA DELTA BEVERAGE GROUP)

Melvin Ford, Esq., for the General Counsel.
David P. Jaqua, Esq., for the Respondent.
Wesley Fiveash, Business Manager, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on May 21 and 22, 2001, in Memphis, Tennessee. The complaint as amended at the hearing was issued by the Regional Director for Region 26 of the National Labor Relations Board (the Board) on charges filed by Teamsters Local 1196, International Brotherhood of Teamsters, AFL–CIO (the Charging Party or the Union) and alleges that Pepsi America, Inc. (fka Delta Beverage Group) (the Respondent or the Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent has by its answer as amended at the hearing denied the commission of any violations of the Act and has raised certain affirmative defenses on the ground that the underlying charges were not filed with the Board within the 6-month limitations period of their occurrence as provided in Section 10(b) of the Act.

On the entire record, including the testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material, during the 12-month period preceding the filing of the complaint, Respondent has been a corporation, with an office and place of business in Collierville, Tennessee, where it has been engaged in the manufacture, distribution, and sale of soft drinks, that during the 12-month period ending January 31, 2001, Respondent in conducting its business operations sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Tennessee and purchased and received at its facility goods in excess of $50,000 directly from points outside the State of Tennessee and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

A. The Appropriate Unit

The complaint alleges, Respondent admits, and I find that at all times material herein the following employees of Respondent (the unit) constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All truck drivers, warehousemen, production workers, dock workers, fleet, quality control and maintenance personnel employed at Respondent's facility at Collierville, Tennessee.
>
> Excluded: All office clerical employees, guards and supervisors as defined in the Act.

B. Background

Respondent, Pepsi America, Inc., formerly known as Delta Beverage Group is operating under a labor agreement which Delta Beverage had with the Union. The current contract will expire by its terms on September 30, 2001. Wesley Fiveash is secretary/treasurer and the business agent of the Union and services the labor agreement as an outside nonemployee representative. Howard Westbrook is an employee of Respondent and is chief steward of the Union. Joe Yates is the plant manager. Jim Russell is Respondent's human resources manager. Each of the individuals alleged as having violated the Act in the complaint are admitted supervisors. There are four general categories of issues in this case. They are changes in the attendance policy, alleged changes in the rules for the presentation and processing of grievances, unilateral changes and direct dealing by Respondent with the employees concerning their working hours and lunch periods, and an alleged unlawful suspension of employee Ernest Blades and an alleged unlawful written warning and threat issued to Chief Steward Westbrook.

Plant Manager Yates took over as plant manager about 6 years ago as of the date of the hearing. After doing so, he undertook to institute a number of changes and in his view to tighten up the grievance procedure and instituted unilateral changes in the hours and terms and conditions of employment of the unit employees. According to the testimony of Business Agent Fiveash, many of the rules and regulation changes were seen as reasonable and were not challenged by the Union. The Respondent's position in this case appears to be that once the Respondent has made a change in the terms and conditions of employment of its employees and the Union has not challenged the change, the Union can no longer seek to bargain about any subsequent changes the Respondent seeks to make. Thus, the

Respondent, in reliance on the general management-rights clause in the collective-bargaining agreement (CBA) and alleged "past practice" contends it is free to institute changes in the terms and conditions of its unit employees at will. Consequently it has routinely implemented changes without prior notice to the Union and has presented changes as "fait accompli" to the employees. When the Union learned about some of these changes and sought to bargain concerning them, the Respondent refused, contending it was free to institute the changes without notice to the Union. In its defense in this case, Respondent contends that the charges are untimely as there were prior instances of similar changes that went unchallenged by the Union and that the charges are thus barred by Section 10(b) of the Act which provides for a 6-month period of limitations from the date of the occurrence for the filing of charges with the Board. Respondent contends that the Union has waived their rights to bargaining over future changes that are made because it did not challenge similar changes in the past. Respondent also contends it is abiding by the contract and has not changed the wages or benefits received by its employees.

C. The Attendance Policy

It is undisputed that in February 2000, Respondent's plant manager, Yates, unilaterally and without prior notice to the Union eliminated from its attendance policy a provision that provided for employees incurring positive occurrences or credits for good attendance that could be used in the future for paid time off. When the Union learned of this change and asked to bargain about it and requested information, they were rebuffed by Respondent. They were neither furnished information nor did Respondent agree to bargain about the changes. In its letter of February 17, 2000, the Union by letter asked for information concerning any problems associated with attendance under the attendance policy prior to the implementation of the elimination of the positive occurrences or credits in the attendance policy. Fiveash testified that in a labor management meeting held on March 21, 2000, Respondent's officials stated they would not and did not have to bargain concerning the change in the attendance policy. They reaffirmed this in a letter dated April 7, 2000, sent by Human Resources Manager Russell to Fiveash. In this letter Russell asserted that Respondent had the right to make changes in the attendance policy under article 3 of the collective-bargaining agreement entitled "Management Functions." This is a broad management-rights clause which does not specifically specify any right to change the attendance policy.

The Union filed a grievance dated March 24, 2000, over the attendance policy change. The Union requested any records that show there was an absenteeism problem with the prior policy. This request was also denied by Russell in his April 7 letter to the Union. The Union has never received the information. At the hearing, Plant Manager Yates testified that there were no attendance policy or absenteeism problems that had led to the change in the attendance policy. Yates asserted that the primary change in the attendance policy was the removal of the Section which allowed the earnings of credits for good attendance. Yates testified that it was a burdensome process to keep up with the credits and to determine when the credits could be used. Yates admitted that at the time of the change in the policy there were employees who had earned and had these credits. Thus, the change removed not only the right to future credits but eliminated existing credits.

Respondent's position with respect to the change in the attendance policy is that it "was contractually privileged under express management rights provisions of the existing CBA, as interpreted and applied by the parties through their course of conduct over many years, to make the unilateral change in its attendance policy." "The Union had long acceded to Respondent's interpretation of the specific management rights provisions permitting Respondent 'to determine . . . standards of performance' as set forth in Article 3 of the CBA. This history of application of the relevant contractual language over the course of successive contracts established Respondent's contractual right to do what it did in this case. Further, to the extent that the Union disagrees that Respondent had the contractual right to make the practical change which it did, the Union's remedy lies in contract and does not rise to the level of prohibited unilateral action violative of the Act."

Analysis

In *C & S Industries*, 158 NLRB 454 (1966), the Board held at 457—where "an employer seeks to modify during the life of an existing contract, terms and conditions of employment embodied and made effective for its term" . . . "neither party is required under the statue to bargain anew about the matters the contract has settled for its duration, and the employer is no longer free to modify the contract over the objection of the Union." At 459—"Respondent's unilateral superimposition of an incentive wage plan upon the contractually established wage plan structure operated as a 'modification' of contract terms within the meaning of Section 8(d)." The Board held it is "not precluded from resolving an unfair labor practice issue calling for appropriate relief under the Act, simply because as an incident thereto it may be necessary to construe the scope of a contract which an arbitrator may also be empowered to construe." In this case, the Employer was held to have violated Section 8(a)(1) and (5) of the Act by instituting without the consent of the Union, a wage incentive system during the term of the existing collective-bargaining agreement.

In *Cypress Lawn Cemetery Assn.*, 300 NLRB 609 (1990), the administrative law judge with Board approval held that the employer had violated Section 8(a)(5) and (1) of the Act by the implementation of a new operations plan which provided for bonuses without first providing a meaningful opportunity for the collective-bargaining representative to bargain about these changes which were mandatory subjects of bargaining. In this case the Board rejected the employer's reliance on a broad management-rights clause as support for its actions in instituting the unilateral change in the employees' terms and conditions of employment, citing *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989), which held that the waiver of a statutory right will not be inferred from general contract provisions. Rather such waivers must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

In *Johnson-Bateman*, supra, the Board also held that the union's acquiescence in the respondent's unilateral implementa-

tion of numerous work rules did not constitute a waiver of its right to bargain about the implementation of a drug/alcohol testing program. In *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), cited in *Johnson-Bateman*, the Board majority held that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all times." The Board in *Johnson-Bateman* also noted that the Ninth Circuit Court of Appeals held in *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969), enfg. 166 NLRB 831 (1968), that:

> [I]t is not true that a right once waived under the Act is lost forever . . . . Each time the bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent "close out" . . . . [Citations omitted.]

In *Kiro, Inc.*, 317 NLRB 1325 (1995), cited by Respondent, the Board found that the employer, an affiliate of the Columbia Broadcasting System, had no obligation to bargain with the union over the decision to produce a regular news program on the channel of an independent television station. However, it also held at 1327 that the employer had an obligation to bargain over the "effects" of this decision which "resulted in increased workloads, split shifts and greater productivity demands for certain unit employees." The Board found at 1327 these changes in working conditions were "material, substantial and significant" and were mandatory subjects of bargaining. It also rejected respondent's defenses that the management-rights clause which reserved to the employer the right to schedule, assign work and establish production standards constituted a waiver of the union's right to bargain over the effects of its decision to produce the 10 p.m. news. It stated that it is well settled that a waiver of statutory rights must be clear and unmistakable citing *Metropolitan Edison*, supra; *Johnson-Bateman*, supra; and *Control Services*, 303 NLRB 481, 483–484 (1991). It found in the *Kiro* case that there was an absence of evidence to support an inference of a waiver from extrinsic evidence of contract negotiations and/or past practice. I find that the *Kiro* case cited by Respondent affords support for the finding of a violation of Section 8(a)(1) and (5) in the instant case as well as do the other cited cases set out above.

More recently in *Brimar Corp.*, 334 NLRB 1035 (2001), a Board majority held that the employer "violated Section 8(a)(5) of the Act by its promulgation and implementation of new 'forms' without giving the Union timely notice and an opportunity to bargain concerning the forms, and by dealing directly with its employees by requiring them to sign the new forms." The Board majority found that "the unilateral introduction of the forms was a material, substantial, and significant change in terms and conditions of employment."

I conclude on the basis of the evidence and in reliance on the above-cited cases that Respondent violated Section 8(a)(5) and (1) of the Act by its institution of the unilateral changes in its attendance policy and by its refusal to furnish the Union with information concerning attendance or absenteeism problems with the old policy. I find the collective-bargaining agreement does not specifically provide the Employer the right to unilaterally change the attendance policy. I find that Respondent has failed to establish by the collective-bargaining agreement or any extrinsic evidence and/or past practice that the Union waived the right to bargain over the changes in the attendance policy. I find that the Respondent has failed to establish its 10(b) limitation on the filing of charges defense as the Union's failure to challenge past changes did not waive the Union's right to challenge changes in the future. I further find that Plant Manager Yates' testimony that there were no attendance or absenteeism problems under the attendance policy did not fulfill the Union's request for information. I agree with the General Counsel's position that Respondent had an obligation to furnish the Union with the requested information and that assuming arguendo that the request was ambiguous, Respondent had an obligation to request clarification in order to comply with the request to the extent it encompassed necessary and relevant information. *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

D. The Grievance Procedure

1. The General Counsel's case

Article 6 of the collective-bargaining agreement entitled: "Union Representation" provides in pertinent part: "The Employer recognizes that the right of the Union to designate bargaining unit employees as job stewards to handle such Union business as may from time to time be delegated to them by the Union. Such Union business will not be conducted on Employer time." Fiveash testified that the Union's interpretation of this language is that it refers to temporary leaves of absence when stewards become involved in local civic affairs such as poll watchers on election days and that the language does not address the function of a job steward within the plant.

Fiveash acknowledged that article 6 does not contain specific language requiring pay for stewards who handle grievances while they are on the clock. However, this article also provides as follows:

> It is contemplated that the steward and the assistant stewards will assist the Employer, the employees and the Union, and they will meet with the representative or representatives of the Employer, including negotiations (except) for a new contract), grievances or other business pertaining to the welfare of the Employer and the employees. *However, the Employer is under no obligation to pay stewards for time spent in meetings when they are not scheduled to work.* [Emphasis added.]

Fiveash testified at the hearing that this language clearly implies that stewards are to be paid for time spent in grievance meetings except for when they are not scheduled to work. He testified further that the company practice has been to pay stewards for attendance at regular grievance meetings. Article 6 also provides that stewards may discuss complaints and grievances of employees on the premises of the Employer. There is no language restricting the location of these discussions.

Section 4 of article 6 provides: "Stewards will be granted time off from work to investigate grievances after requesting and receiving permission from their supervisor (which shall not be unreasonably denied) however, such grievance investigation

shall not interfere with production." Fiveash testified that consistent with this provision, stewards have been paid for time spent handling grievances while they were on the clock and this had been the practice with both Delta Beverage and Pepsi Americas.

Howard Westbrook, who has been the Union's chief steward at this plant since 1978, testified he has handled and processed grievances while he was on the clock and has consistently been paid by the Employer for this time. Westbrook would obtain permission from his immediate supervisor to leave his work area to handle grievances including first- and second-step grievance meetings. The presence of a steward is not required for the presentation of a first-step grievance which may be filed directly by the employee. However, upon request by the employee, a steward may be present at the first-step meeting as well as at subsequent step meetings where the steward's presence is required under the collective-bargaining agreement. After obtaining permission from his supervisor to leave his work area to handle grievances, Westbrook would, upon request by an employee, make arrangements with the immediate supervisor of the employee to schedule a first-step meeting. Westbrook did not discuss grievances at work with the employees. Normally, the employee would call Westbrook at home or talk to him after the end of the shift.

Third-step grievance meetings were scheduled by Fiveash and Russell, Westbrook attended these third-step meetings as chief steward while on and off the clock. Westbrook was paid by the Employer for his attendance at these meetings while he was on the clock. However, if the third-step meeting extended beyond the end of the shift, Westbrook would clock out and then return to the meeting which prevented him from incorrectly receiving credit for time spent in the grievance meeting beyond the normal quitting time.

In April 2000, Westbrook's immediate supervisor, Greg Shea, told him to go to the conference room for a third-step meeting and ordered him to clock out prior to doing so. Westbrook clocked out about 2:20 p.m. His shift ended at 3 p.m. After the meeting, Westbrook complained to Fiveash and Russell about this and Russell said he would take care of it. However, Westbrook was never paid for the lost time.

Subsequently, Westbrook was given a written warning on May 15, by his supervisor, Greg Shea, for being out of his work area without permission on May 12. Westbrook is a mechanic and works throughout the production area. Westbrook informed Shea that he had begun his break and had gone to the warehouse area to present two grievances to Steve Smit, who is the warehouse manager which is a separate area from the production area. However, the warehouse employees are part of the unit represented by the Union. Shea told Westbrook he should take his breaks in the designated break area which is adjacent to the production area. Shea also told Westbrook not to discuss union business on his breaks prior to this incident.

The two grievances which Westbroook had attempted to present to Smit were on behalf of truckdriver Billy Ray Morris. Westbrook was attempting to turn in two second-step grievances as Morris advised him he had been unsuccessful in attempting to file the grievances at the first-step meeting. Morris testified at the hearing that he had requested the presence of a union steward but was told by management that none were available. Westbrook did not want the grievances to be untimely. Westbrook testified that at about 2:10 p.m. he began his break and went to Smit's office and told Smit he had two grievances for Morris to turn in at the second step. Smit refused to take them on the ground that Morris had not had a first-step meeting. Westbrook testified he returned to the production area and observed that the pet line palletizer was down. Although he was still on break he went to work on the palletizer in his job as a mechanic. At about 3:10 p.m., he went again to see Smit. He testified he did not seek permission to leave his work area because he had not yet finished his break which had been interrupted by his work on the palletizer. He went to the reception area and paged Smit who arrived shortly thereafter and told him his break was finished. Morris was present at that time. Westbrook then returned to work without having been able to file the grievances. When Westbrook returned to production he saw Maintenance Manager Glen Dallmann and asked for permission to be relieved to have a first step meeting with Smit and Morris. Dallmann denied this request.

On May 16, Westbrook requested a first-step meeting to file a grievance concerning his written warning. Shea scheduled the meeting for May 18, at 11:30 a.m., which was Westbrook's normal lunch. The meeting was not held because Westbrook worked all day on May 18 to repair the Shrink-wrap machine. Westbrook asked another employee to attempt to reschedule this first-step meeting. However, Shea said it was untimely.

Shea testified that on May 12, he was informed by Dallmann that Smit had called and said that Westbrook had been in his office in an attempt to file a grievance. Dallmann asked Shea to investigate. Shea testified that later that day he saw Westbrook in the lobby area and asked him what he was doing in the warehouse area earlier that afternoon. Westbrook told him he was attempting to file a grievance for Morris. Shea testified he asked Westbrook if he had asked permission to go to the warehouse. Westbrook said he did not need to because he was on break. Shea told him he was out of his department and that being on break was not relevant as breaks are taken in the breakroom. Shea then asked him why he was in the lobby if he had taken his break. Westbrook told him he had split his break. Shea testified he reported this to Dallmann and decided to give Westbrook a written warning for being out of the production area. Shea testified he did not remember having told Westbrook he could only talk to employees about union business or grievances in the designated break area.

Fiveash testified he had attended several grievance meetings during worktime at Respondent's facility which were during worktime and that Westbrook was present. He also testified that Westbrook had been paid for his attendance at grievance meetings during worktime.

2. Respondent's case

Respondent in its defense to this allegation contends that the only evidence in the record concerns the events of May 11–12, 2000, involving Chief Steward Westbrook's attempts to file a second-step (written) grievance to Warehouse Manager Smit outside of Westbrook's work area. It contends, "there was no

evidence adduced by General Counsel as to any actual implementation or announcement (oral or written) of any change in the way in which the Company administered the grievance procedure with respect to first or second step grievances or any new restrictions placed on union stewards." Fiveash admitted he is normally not involved in the grievance procedure until step three when the outside union representative meets with the human resources manager. Fiveash is not in the plant when employees and their stewards meet with supervisors regarding grievances. In the July 20, 2000 response to the grievance of Howard Westbrook, the language of article 8 step two of the grievance procedure was quoted and Respondent stated that "[t]he contract language is clear in stating that the Grievent must present the grievance to his manager. It is up to the Grievant if they want to have the steward in attendance." The response also states that "[w]hen situations exist where the Company decides that grievances can be scheduled during working hours and the Grievent can be relieved from work he will be paid for the time spent in the hearing." (GC Exh. 14.) Respondent concedes that this statement by the Company is consistent with the Union's position on the proper procedure. However, Respondent contends that it is undisputed as testified to by Shea that the actual procedure for the past 4 years has been to release the union steward if work permits and tell him to clock out.

Respondent contends there was no evidence to support the complaint allegation of the alleged unilateral change of requiring stewards to be off the clock to attend step-one grievance meetings about April 26, 2000. There was no evidence addressed of any unilateral change of any step-one or two procedures having occurred in April or any other time in the year 2000. Further, Respondent notes that there is no specific language in the collective-bargaining agreement allowing the Union acting alone to present grievances and in the preceding contract negotiations the Union proposed and the Company rejected a change in the language of article 8, section 2 of the collective-bargaining agreement that would have permitted the Union to file grievances concerning contract differences or involving multiple employees. Fiveash acknowledged that the Company does not hold the step-one meetings with the stewards alone. This is not new. On June 11, 1998, the Company responded in writing to a grievance filed by Union Steward Charles Scott, who had received a written warning for being out of his work area while attempting to have a grievance hearing with the warehouse supervisor. The grievance was denied by Russell who noted that Scott did not have permission to meet with the supervisor. In his response Russell stated, "The grievance at step one is an oral meeting between the person who feels that they have a grievance and the immediate supervisor and can be without a union steward. It is not a meeting between the Union steward and the supervisor minus the Grievant." This is identical to the way the Company dealt with Westbrook on May 11–12, 2000. There has been no change in procedures. Westbrook admitted on cross-examination that other employees had been warned for being out of their work areas without authorization in violation of rule A-9. Westbrook had himself filed a grievance in 1991 (R. Exh. 13) complaining that Supervisor Cleatis Allen had told him he was not to conduct union business on company time.

Shea denied having had a conversation with Westbrook around the time of the May 12 incident time concerning whether Westbrook was to be on the clock or paid. Shea testified that as far back as 4 years ago he had told Westbrook to clock out when being released from work for the handling of grievances. Shea testified he had never permitted Westbrook to take breaks in areas other than the break area or the parking lot.

Warehouse Manager Smit testified that when Billy Ray Morris returned from his first suspension on May 11, 2000, he requested a first-step meeting but there was no steward available. On the next day, May 12, Westbrook attempted to hand Smith two written grievances on behalf of Morris in the warehouse. Smit declined the offer and told Westbrook that Morris had to be present. He also e-mailed Maintenance Manager Glen Dallmann that Westbrook had been in the warehouse area at 2:10 p.m. He testified that he was paged to the lobby at 3:15 p.m. and found Westbrook there with the grievances in his hand and Westbrook said he had requested Morris to come also. Morris was not present and Smit told Westbrook he could not wait for him. He also questioned Westbrook as to whether he was supposed to be working.

Russell confirmed that those events were not a departure from past practice. Union Steward Charles Scott had contended he could be out of his work area to file grievances. His grievance was denied and the Union did not request arbitration. Employee Reginald Harris was terminated for being out of his work area. Employer Robert Reese received similar discipline to Westbrook.

Plant Manager Yates testified that he began to tighten procedures for handling grievances about a month after he arrived 6 years ago. He testified there was no change in 2000 in the manner in which the Company administered procedures for the handling of grievances by union stewards. There was no new rule regarding union stewards conducting business on company time or in production areas. No breaks were to be taken in work areas.

Analysis

I find as contended by the General Counsel in brief "that in the year 2000, Respondent engaged in an intentional effort to weaken and limit the application of the grievance procedure and to undermine the Union." This conduct consisted of unilateral changes, a modification of a contract term, and the discipline of Chief Steward Westbrook. I fully credit the testimony of Westbrook and Fiveash that Respondent had routinely paid Westbrook for time spent in grievance meetings while on the clock. I find as contended by General Counsel that in April, Respondent abruptly changed this practice when Supervisor Shea told Westbrook to clock out before attending a third-step grievance meeting during worktime. It is also clear from the testimony of Westbrook and Morris that Respondent's supervisors, Smit, Dallmann, and Shea were engaged in an effort to frustrate the timely filing of grievances by Morris and subsequently by Westbrook over his grievance. I find the discipline of Westbrook for being out of the production area while attempting to file a grievance on behalf of Morris was pretextual

and discriminatory and violated Section 8(a)(1) and (3) of the Act. I find Respondent had knowledge of Westbrook's status as chief steward, had animus against the Union and that the discipline of Westbrook was motivated in part by Respondent's desire to frustrate union activities at the plant. I find Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). I find the changes in the grievance procedure were violative of Section 8(a)(5) and (1) of the Act.

I further credit Westbrook's testimony concerning Shea's instruction to him that he could only take his breaks in the break area and could only talk to employees about union business in the break area and that he could not conduct union business on company time. Respondent violated Section 8(a)(1) of the Act thereby. There is no contract prohibition of this activity in areas other than the break area and these prohibitions are contrary to the contract requirement that stewards are to be granted time off for grievance related matters if they do not interfere with production.

E. The Elimination of the Meal Period

Article 25, section 2 of the collective-bargaining agreement entitled "Rest Periods and Meal Periods" provides:

> A meal break shall be given to each employee, which shall not be less than one-half hour nor more than one (1) hour during any shift. The meal break shall be given between the third and sixth hours of the shift.

In May 2000, Respondent went to a three-shift operation staggering the starting times of the employees. As an example, a group of employees reporting at 7 a.m. on Monday morning would report 1-1/2 hours later the next day. By Friday, they would be reporting several hours later. In August, some can-line employees approached Plant Manger Yates about eliminating their lunch breaks which would eliminate the staggered starting times and would allow the employees to work an 8-hour shift with the same start and finish times each day. Yates told the employees he had no problem with this but all of the employees involved would have to agree.

Yates testified that the schedule change went into effect in August. The Union filed a grievance in September. A meeting was held on the grievance near the end of October. The grievance was not advanced to the third step by the Union. Respondent returned to the old schedule including the half-hour unpaid lunch, in January 2001, following the filing of an unfair labor practice charge by the Union. Respondent wrote a response to the grievance criticizing the Union for acting contrary to the employees' wishes.

Analysis

The Respondent's unilateral elimination of the unpaid lunchbreak from the work schedule of the can-line employees modified a specific term of the collective-bargaining agreement. Yates admitted he was aware that the elimination of the lunch period was contrary to the terms of the collective-bargaining agreement. It is clear that the lunch periods were a condition and term of employment and were embodied in the collective-bargaining agreement. Respondent dealt directly with the can-line employees and bypassed the Union by the unilateral elimination of the lunch periods in violation of Section 8(a)(5) and (1) of the Act. It also undermined the Union by the criticism of the Union contained in its response to the grievance which was distributed to the employees in violation of Section 8(a)(5) and (1) of the Act. See *C & S Industries*, 158 NLRB 454 (1966).

F. The Suspension of Ernest Blades

Ernest Blades is a long-term employee (18 years) and a union member normally assigned to the bottle line in the production area. On occasion he is called upon to work on the bag-in-box line which is a more strenuous job. In early June 2000, Blades substituted for a week as a union steward for Westbrook and Steward Herbert Washington who were on vacation. The Union faxed the Respondent a notification that Blades would be an acting steward. According to Blades he was approached by Plant Manager Yates who mentioned the notification and told Blades he would have fun with Blades that week. Yates denied having made this comment. I credit Blades. During the week he was acting, steward Blades filed one grievance, apparently without incident.

On August 10, 2000, Blades was assigned to work on the bag-in-box line as a filler operator where he operated a machine that had two filler heads. Blades would fill a bag with product, put the bag in a box and step on a pedal to move the box down the line. As one bag is filled and placed in a box, the other filler head is filling another bag. The filler heads fill the boxes sequentially rather than two boxes at the same time.

Blades testified that on August 10, he was working with four other employees on the bag-in-box line as a filler operator. There were four other employees assigned to this line. One employee was making cardboard boxes. One employee was gluing the boxes. One employee was stacking the boxes and there was a forklift driver. The employee making the boxes sends them to Blades who filled the boxes and sent them on the conveyor belt to the gluer. The boxes are then sent to the stacker who removes the boxes from the line and stacks them on a pallet. The forklift driver takes the pallet, wraps it, and stores it in the warehouse. Blades testified that August 10 was the first day the stacker had worked in the plant and the stacker was unable to keep up causing a backup on the line. Blades testified that the stacker asked him to slow the line down and to stop the line which he did. Blades also testified that forklift driver Herbert Washington was having problems because he had insufficient space in the warehouse to put the product and the line was backing up as a result. This testimony was corroborated by Washington who testified he had to move other products in the warehouse to make room for the product from the line. Washington testified he told Shift Supervisor Calvin Rhyan about the problem but that Rhyan merely shrugged his shoulders.

Blades testified that he was running only one of the two heads at the beginning of the shift because the stacker was being trained. About 1-1/2 hours to 2 hours after the start of the shift, Supervisor Calvin Rhyan asked Blades why he was only running one head. Blades told him the stacker could not keep

up. Rhyan told him to run two heads. Blades complied with this order.

Blades was given a 5-day suspension for running only one filler head on August 10. This suspension was purportedly given to Blades for unintentionally impeding production. However, current employee Herbert Washington testified that there was a temporary employee who needed to be shown how to stack the product and that there was a backup on the line requiring that the line be run slower with only one head. Supervisor Calvin Rhyan testified that when he observed Blades only running one head in the bag-in-box line, he asked him why he was running only one head and that Blades said he always ran only one head when he runs this line. Rhyan testified he was unaware of any backup on the line that day. Blades' handwritten grievance states he told Rhyan, "[T]old him I only use one head all time." Blades testified he was referring to instances when he was training another employee. I do not credit Blades' explanation.

Analysis

I find that the General Counsel has failed to establish a prima facie case of a violation of the Act by the suspension of Blades. I find the comment made to Blades by Yates that he would have fun with Blades the week Blades served as temporary steward was innocuous and did not constitute a threat. Further, this incident occurred 2 months after Blades had served as steward without incident. I find there is no evidence that the suspension was motivated by animus toward the Union or toward Blades because of his role as a temporary steward for 1 week. Assuming arguendo that a prima facie case was established, I find it had been rebutted by the preponderance of the evidence. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully revising the attendance policy.

4. Respondent violated Section 8(a)(1) and (5) of the Act by modifying a term of the contract concerning meal breaks and hours of employment.

5. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the grievance procedure.

6. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain within the Union.

7. Respondent violated Section 8(a)(1) and (5) of the Act by bypassing the union and dealing directly with the employees on the can line, thus undermining the Union.

8. Respondent violated Section 8(a)(1) of the Act by limiting Westbrook's conduct of union activities and discussion of union matters to the breakroom.

9. Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning and threat to Chief Steward Howard Westbrook for being out of his work area.

10. Respondent did not violate the Act by its suspension of employee Ernest Blades.

11. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with relevant information concerning its unilateral change in the attendance policy.

12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in several violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act.

It is recommended that upon demand of the Union, the Respondent immediately rescind the unlawful unilateral changes initiated by Respondent and upon request by the Union within 10 days engage in bargaining with the Union concerning any changes in the hours, wages, and terms and conditions of employment of the unit employees. Respondent shall immediately furnish the Union with the information which it requested in February 2000, concerning the attendance policy. Respondent shall immediately remove the written warning from the records of Howard Westbrook and inform him in writing of this and that the written warning will not be used against him in any manner in the future. Respondent shall be ordered to make whole its employees for any loss of wages and benefits they may have sustained as a result of Respondent's unlawful conduct. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short-term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Pepsi America, Inc. (fka Delta Beverage Group), Collierville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally revising its attendance policy, modifying contract terms and changing the grievance procedure.

(b) Refusing to bargain with the Union, by passing the Union and engaging in direct dealing with the unit employees, and undermining the Union.

(c) Refusing to furnish the Union with relevant information.

(d) Disciplining its employees and issuing written warnings and threats to its employees because of their engagement in union activities.

(e) Respondent shall not in any like or related manner interfere with, restrain, or coerce its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request by the Union, immediately rescind the unilateral changes in the attendance policy, the contract terms and the grievance procedure found unlawful in this decision.

(b) Immediately furnish the Union with the information requested by it concerning the attendance policy in February 2000.

(c) Notify the Union and offer to bargain with respect to any proposed changes in the wages, hours, and terms and conditions of employment of the unit employees and upon request bargain changes with the Union and if agreement is reached, embody the agreement in a signed agreement.

(d) Within 14 days, rescind the written warning issued to Howard Westbrook, remove it from its files and within 3 days notify him in writing that this has been done and that the warning will not be used against him in any manner.

(e) Make the unit employees whole for any loss of earnings or benefits sustained by them as a result of the aforesaid unfair labor practices.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1998.

IT IS FURTHER ORDERED that the compliant is dismissed insofar as any violations are not specifically found.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."